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Twenty-ninth session

SUMMARY RECORD OF THE 597th MEETING

Held at Headquarters, New York,
on Thursday, 6 June 1996, at 10 a.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

Article 1

1. Mr. SORIEUL (International Trade Law Branch) said the drafting group would need to review the draft Model Law to ensure consistency. A number of substantive issues also remained. With respect to article 1, at the previous session the drafting group had concluded that the second of the two formulations in square brackets appearing in the third footnote to the article was preferable. If the Commission approved that view, a list could then be prepared indicating the kind of message that would be excluded from the scope of the Model Law. That approach would conform to article 5, paragraph 2, article 6, paragraph 2, and article 7, paragraph 3, of the Model Law, where a list of exclusions would also be required.

2. Ms. BOSS (United States of America) said her delegation would support adoption of the second alternative listed in the third footnote, since that had been the consensus in the drafting group.

3. Mr. ALLEN (United Kingdom) said the first alternative, specifying all the situations to be covered by the Model Law, would in practice present serious difficulties, and might well make the Model Law more restrictive than intended; his delegation therefore supported adoption of the second alternative.

4. Mr. MADRID (Spain) agreed that the second formulation was preferable - particularly since the intent was to allow States to extend the applicability of the Law - and would accord better with later articles. Use of the first alternative would in fact, be likely to restrict the scope of the Model Law.

5. Mr. MAZZONI (Italy) and Ms. REMSU (Observer for Canada) supported adoption of the second formulation.

6. The CHAIRMAN said there appeared to be a consensus in favour of the second formulation in the third footnote to article 1.

7. Mr. SORIEUL (International Trade Law Branch) said the second issue left pending by the drafting group was whether there was a need to include a rule of interpretation concerning the intent of the parties. The question arose, for example, as to whether contracts concluded in writing prior to the entry into force of the Model Law would be affected by its provisions, and whether the functional equivalent of "writing" provided for under the Model Law would prevail or whether the original contract would subsist.

8. Mr. ABASCAL (Mexico) said the phrase "rule of law" was used in connection with the Model Law to cover laws enacted under the various legal systems in question. However, the UNCITRAL Model Law on International Commercial Arbitration embodied a different approach, in that it allowed parties to instruct arbitrators which rules of law were applicable for the settlement of a dispute. In that context, "rules of law" had been taken to include precepts not

emanating from national legislation, such as the UNIDROIT rules governing international contracts. In view of the different approaches, the Commission should seek other language so as to avoid erroneous interpretations.

9. Ms. BOSS (United States of America) said the question as to whether a rule of interpretation was needed to determine the meaning of an agreement entered into prior to the adoption of the Model Law affected only a small number of cases. Furthermore, the Model Law, in chapter III, allowed variation by agreement in many cases. The real issue was to determine the will or intent of the parties as expressed in the agreement. In the United States the answer to that question would depend on the agreement as a whole, on statutory interpretation and on the circumstances. Where, for example, an agreement required a notice in writing, but that requirement merely mimicked a statutory writing requirement, thus bringing the statutory requirement into the agreement, it could be argued that the Model Law's interpretation of that statute would similarly be brought into the agreement, since it had been the intent of the parties to incorporate what existed under statutory law. Where, however, there was no outside reference to statutory law, as in the case of a company controlling its employees by requiring that any acts of the company should be represented in a writing approved by the company's home office and signed by given individuals, it was more likely than not that the parties intended a paper document signed by the appropriate officials. It was thus not appropriate to have an interpretational provision in the Model Law that applied across the board; the matter should be governed by the domestic law dealing with the interpretation of agreements between parties.

10. Mr. MASUD (Observer for Pakistan) said the question of a rule of interpretation did not apply solely to agreements entered into prior to the adoption of the Model Law; it had a broader application. Where it was clear that the intent of the parties had been to have something in writing the Model Law should not impose electronic means as a substitute for such written documents. The whole purpose of the Model Law was to facilitate the use of electronic means, not to impose them.

11. Mr. SANDOVAL LÓPEZ (Chile) said there was no need for a rule of interpretation, since the general principle governing contracts was that they should take into account relevant legislation in force at the time the contract was concluded.

12. Mr. TELL (France) questioned the relevance of a rule of interpretation in what was, after all, a model law, and thus not to be imposed on parties to agreements.

13. Mr. MADRID (Spain) said there was a fundamental problem in that chapter III of the Model Law expressly provided that parties might vary its provisions, whereas the intent in chapters I and II was the contrary, namely that there was to be no variation. That point might be elucidated in the Guide to Enactment. Notwithstanding the provisions of chapter II, if the parties wished a document to be in writing, that wish should prevail since it was the fundamental will of the parties in question. Where there was no question of the fundamental will of the parties, the situation was different, and a functional equivalent under the Model Law would be valid. As noted earlier, the aim of the Model Law was to

facilitate electronic data interchanges in commercial transactions, but not to impose them.

14. Mr. ALLEN (United Kingdom) agreed that there should be no rule of interpretation along the lines suggested. Parties could always extend the meaning of the word "writing", and if they had a requirement for writing the chances were that they meant writing in the traditional sense.

15. Mr. ABASCAL (Mexico) agreed there was no need for a special rule of interpretation. Perhaps a section on interpretation should be in the Guide, as that concern was not dealt with in the Model Law itself (A/50/17, para. 236).

16. Ms. BOSS (United States of America) noted there was an emerging consensus in the Commission that no specific provision on interpretation was necessary. She agreed with the suggestion that the issue should be covered in the Guide. It might not be judicious to state categorically in the Guide that the rules were mandatory. The Commission had yet to consider article 10, paragraph 2, whose wording had been specifically agreed upon, whereby the provisions of chapter II could be varied if permitted by domestic law.

17. Mr. ANDERSEN (Observer for Denmark) supported the proposal to discuss interpretation in the Guide. He wondered whether it would be appropriate to include the third footnote to article 1 in the Guide as well.

18. Mr. SORIEUL (International Trade Law Branch), replying to the Mexican representative, said that, although the Working Group had reopened the debate on article 10, paragraph 2, when it considered article "x", for purposes of the Commission, that debate was closed. The term "rule of law" was used differently in article 28 of the UNCITRAL Model Law on International Commercial Arbitration and in the draft Model Law on EDI. In the latter Model Law, the term covered, inter alia, mandatory rules, laws and decrees and case law but not contractual law, including the Uniform Customs and Practice of the International Chamber of Commerce.

19. Mr. ABASCAL (Mexico) said although the debates held the year before were not to be reopened, the Commission's report (A/50/17) did not actually contain final decisions. The Working Group had never informed the Commission of the problem of interpretation in two different contexts and no discussion had been held. In the UNCITRAL Arbitration Model Law "rule of law" meant the selection of laws from a specific legal system, whereas in the Model Law on EDI, it did not. The easiest solution would be to find another term.

20. Mr. SORIEUL (International Trade Law Branch) asked the Mexican representative if he was proposing that the words "where the rule of law ..." in article 5, paragraph 1, should be replaced by "where law ...".

21. Mr. ABASCAL (Mexico) said he felt "rule of law" should not be used but was not necessarily proposing a specific replacement text.

22. Mr. LLOYD (Australia) said his delegation was pleased that the prevailing view was that no special provision was needed on contractual agreements made prior to the adoption of the Model Law. A transitional clause allowing

countries to adapt the Model Law to their own legal systems might be more useful than an explanation in the Guide. He acknowledged that the term "rule of law" had a broader application but would not comment at the current stage on the Mexican representative's remarks.

23. Mr. CHANDLER (United States of America) expressed shock at the restrictive interpretation of the term "rule of law" contained in the Commission's report. The consequences provided for in the Model Law flowed from the law but also very definitely from customs and practice. Indeed, the Commission's work would not be very valuable if customs and practice were not taken into account, particularly in the field of electronic data interchange. Article "x", paragraph 2, should be redrafted accordingly.

24. Mr. MAZZONNI (Italy) agreed that international trade law was much broader than "rules of law" and embraced customs and practice as well. Consistency in the Model Law was also of paramount importance.

25. Mr. SORIEUL (International Trade Law Branch) reiterated that the Commission had to decide on a question of terminology or form, and one of substance, namely whether to include customs and practice within the scope of articles 5, 6 and 7.

26. Mr. ALLEN (United Kingdom) said there were three ways in which customs and practice were relevant to law: (1) when they were incorporated into a contract, either expressly or implicitly, including by common law; (2) when rules were developed through customs and practice and then became rules of law by incorporation; and (3) when customs and practice were referred to in interpreting how a statutory rule of law was to be applied. Customs and practice did not have to be specifically mentioned in any of those cases. Chapter II was concerned, not with the contractual relationship of the parties, but solely with rules of statutory law and case law. Even where a statute was developed through customs and practice so that they effectively became a rule of law, chapter II would automatically apply. The Commission should not interfere with the application of rules derived from customs and practice. The term "rule of law" should be clarified in the Model Law - perhaps in the definition portion - as not everyone would read the lengthy draft Guide.

27. Mr. MADRID (Spain) agreed wholeheartedly with the representative of the secretariat that two different questions must be resolved, one of form and the other of substance. Concerning the question of form, it would be important to ensure that whatever term was used did not have different meanings within the draft Model Law and that if it were replaced, the new term was truly appropriate in every context. Concerning the question of substance, Commission members should indicate whether they preferred a broad or narrow interpretation of the term "rule of law". The Commission should explain its choice in the draft Guide, bearing in mind that its interpretation might be much narrower than it was in many countries which incorporated customs and practice into their definition of rule of law.

28. Ms. BAZAROVA (Russian Federation) suggested that if the words "rule of law" were removed from article 5, paragraph 1, the paragraph could be revised to indicate that if an agreement called for information to be presented in writing,

that presentation in writing could be replaced by the same information in the form of a data message.

29. Mr. TELL (France) said the Commission had excluded contractual stipulations and trade usages or practice from the scope of application of articles 5, 6 and 7 of the Model Law. The reference to "rule of law" could not be easily transposed to the context of electronic data interchange. His delegation opposed the inclusion of international commercial practices or rules of the International Chamber of Commerce in the scope of "rule of law".

30. Mr. MAZZONI (Italy) said in international trade law, the term "rule of law" had acquired a meaning which encompassed rules other than those included in decrees of national legislation or acts of parliament. The emphasis on the international origin of the Model Law in article 3 of the draft had been intended to forestall the tendency to interpret expressions on the basis of national legal concepts. Unless the term was to be interpreted in a broad sense in the context of the Model Law, it would therefore have to be replaced because of the technical meaning it had already acquired.

31. Mr. ABASCAL (Mexico) associated himself with the position of the Italian delegation that the term "rule of law" should be interpreted broadly in the Model Law. For example, the provisions of the International Institute for the Unification of Private Law (UNIDROIT) were not customs and practice, but rules of law existing in the international community that were part of international trade law. The matter should not be left for explanation in the Guide; if the term were to be interpreted in the narrow sense, then it should be changed and an appropriate explanation of the change included in the Commission's report.

32. Ms. BOSS (United States of America) said the apparent disagreement over interpretation of the term "rule of law" stemmed from differences in legal systems and their approaches to dispute resolution. Her delegation agreed with that of France, in that customs and practice, in so far as they were recognized, were part of the rule of law. That was not to say that customs and practice should necessarily be seen as partial sources of law, but the inability of positive statutory law to cover all situations meant that customs and practice developed over time had to be applied as well.

33. Her delegation had been troubled by the Guide's narrow and restrictive interpretation of the term "rule of law", and suggested either reformulating article 5, paragraph 1, to make that term unnecessary, as suggested by the Russian Federation, or replacing "rule of law" by "where law requires". Whatever terminology was used should be broad enough to allow the Model Law to be used in the interpretation of customs and practice as they were recognized and applied to the transactions at hand.

34. Mr. SANDOVAL LÓPEZ (Chile) agreed with those delegations which were in favour of strictly interpreting the term "rule of law" as meaning rules originating in legislatures or other law-making bodies. Any replacement of the term should follow that interpretation.

35. Mr. ALLEN (United Kingdom), supported by Mr. GOH (Singapore), said the Commission needed to decide on a neutral term that covered but did not exceed

case law, statutory rules, and customs and practice in so far as those formed part of the law. He suggested modifying the United States formulation of "where law requires" to read "where the law requires" as a way to include all three categories.

36. Mr. MASUD (Observer for Pakistan) suggested adding the words "or customs and practice recognized as rules of law" after "rule of law".

37. Mr. LLOYD (Australia) said some customs and practices were not rules of law, but were simply chosen by the parties; inclusion of such customs and practices would constitute an inappropriate modification of the meaning of chapter II of the Model Law. He therefore supported the United Kingdom formulation "where the law requires".

38. Mr. MAZZONI (Italy) said under Roman law, while "rule of law" could include rules which were non-parliamentary in origin, the term "the law" was more restrictive in scope than was perhaps intended in the current case by members of the Commission. If a majority of the Commission wished to adopt the term "the law", however, the Guide should make clear that the expression included case law and customs having the force of law.

39. Mr. ABASCAL (Mexico) agreed with the position of the Italian delegation. The formulation suggested by the United Kingdom raised the possibility that a broad interpretation of the term "the law" would be inconsistent with article 28, paragraphs 2 and 4, of the UNCITRAL Model Law on International Commercial Arbitration, where a clear distinction had been drawn between "the law" and the usages of the trade applicable to the transaction at hand.

40. Mr. MADRID (Spain) said he agreed with the Mexican delegation that changing "rule of law" to "the law" would not solve the problem of inconsistency between different model laws, since the latter term also had a narrower meaning in the UNCITRAL Arbitration Model Law than in the Model Law under discussion. Thus, it made no difference which term was used, as long as the Guide explained that the term referred to any generally recognized rule that overrode the will of the parties concerned.

41. Ms. BOSS (United States of America) said terminological inconsistencies, even among the products of a single body, were virtually inevitable. The phrase "rule of law" was more likely to be interpreted in a technical sense, whereas "the law"" lent itself to a wider variety of interpretations. She recognized the conflicts pointed out by the representative of Mexico, but they did not seem to represent an insurmountable difficulty. More troubling was Italy's observation that "the law" could be interpreted too narrowly under certain legal traditions. She suggested two alternatives: retaining "rule of law" and defining that term in article 2 of the text, or replacing it with the broader term "the law" and elucidating its meaning in the Guide.

42. Mr. SORIEUL (International Trade Law Branch) said he favoured the term "the law", which covered the whole system of applicable law, including legislation, case law and recognized practice. The Guide should explain that the term encompassed those three categories of rules. He saw no inconsistency with

article 28 of the UNCITRAL Arbitration Model Law, since the latter dealt with the choice among different types of applicable law.

43. Mr. CHOUKRI (Observer for Morocco) said he was satisfied with the term "rule of law", since any law consisted of various types of rules.

44. Mr. MADRID (Spain) said that, with respect to the second alternative proposed by the United States delegation, users of the Model Law would not necessarily consult the Guide for clarification of the term "the law". It would be preferable to retain "rule of law", which clearly had a more specific meaning, and to give a brief definition of the term in article 2.

45. Mr. MAZZONI (Italy) said either proposal was acceptable, but he also preferred the first alternative.

46. Mr. TELL (France) said he supported the secretariat's proposal because the term "law" was broad enough to encompass all of the areas to be covered by the Model Law. It was inadvisable to define the term in the Model Law itself because that would only lead to more disagreement and difficulty, in view of the variety of legal systems in the States members of the Commission.

47. Mr. ALLEN (United Kingdom) said the two possibilities mentioned by the United States representative were not mutually exclusive and a compromise solution could be to use the term "the law" and define it in article 2.

48. Ms. BOSS (United States of America) said she agreed with the French delegation that the Commission was unlikely to find a definition that would be acceptable to all of its members; for that reason, any explanation of the term used should appear in the Guide and not in the Model Law itself. She would prefer to use the term "the law" and to define it in the Guide.

49. The CHAIRMAN said there appeared to be a consensus in favour of the proposal just made by the United States representative.

The meeting rose at 1 p.m.